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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

PERLIE P. FALLON,
Counsel.

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The respondents' attempt on page 16 of their brief to limit *Irving Trust Co.* v. *Perry*, 293 U. S. 307, to claims involving liquidated damages for rent. This is repelled

by the words which this Court used in its opinion at page 311:

> "The claim * * * is founded upon an independent express contract, and hence within the very words of Sec. 63(a) 4."

The argument that "no breach" of this executory contract to do an act "ever occurred" (Respondents' brief, p. 16) is contrary to the decision in *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, which held bankruptcy is an anticipatory breach of an executory contract. The argument petitioner made as to the rule of damage declared by the Nebraska courts at pages 16 to 19 of her brief has not been met, nor the numerous authorities there cited distinguished. That this claim for damage survived the surrender was shown at pages 20 and 21 of petitioner's brief. Respondents are silent on this. They merely restate the objection. They do not justify it. Their entire argument on the item rides in the face of the reservation which after all must have meaning. Further, an assumption of covenants is never construed as an assumption of past breaches. *Townsend* v. *Scholey,* 42 N. Y. 18, 21 (1870), which held an assignee of a lease, assuming the covenants, is not liable for the prior breach of a covenant to build. The respondents have not met the case made by the petitioner on her brief and this item of the claim is clearly allowable.

The Breach of the Lease.

The respondents apparently concede that if there was a rejection the item of the claim for the breach of the lease is allowable. (Respondents' brief, p. 7.) Their position is not clear however. They misconstrue the agreements. The agreements are analyzed at page 25

of the petitioner's brief and the Court is respectfully asked to read there in order to clear up the confusion respondents have unintentionally created as the basis of their argument. The Court below said (R. 182, fol. 287) "the claim was ostensibly within the statute."

The argument that there was no continuing liability does not meet the case. The claim is based on damages. The statute is based upon damages. This was argued at page 33 of petitioner's brief and is not answered. Sec. 77B (b) (10) rejects the argument made by respondents on this point. It says "injury resulting from the rejection of an unexpired lease of real estate *or* for damages or indemnity under a covenant contained in such lease shall be treated as a claim". The Congress contemplated a lease terminated because of rejection. The Congress therefore included breach of the lease itself as well as breach of a covenant for damages. It was pointed out in *T. A. D. Jones Co.* v. *Winchester Repeating Arms Co.*, 61 F. (2d) 774, the case which respondents cite, at page 775 of the opinion, that in some States rights of action survive common law reentry in the absence of a covenant. Since Nebraska is such a State (*Allen* v. *Saunders*, 6 Nebraska 436, 442 (1877); *Hayward Bros.* v. *Ramge*, 33 Nebraska 836, 841 (1892); *Merrill* v. *Willis*, 51 Nebraska 162, 164 (1897)) the drafter of a lease there would naturally not include such a covenant.

The respondents argue that the lease did not survive the assignment agreement and the agreement with Frelem. This argument ignores the fact that Sec. 77B (b) (10) makes termination of the lease a condition, that the claim is for damages, and the reservation. The point regarding the assumption of the covenants is covered at page 38 of petitioner's brief. It is argued in

respondents' brief as an indication of an intention to abandon all claims and that is repelled by the reservation which ran against the estate as to "any and all liability of any nature with respect to the lease."

The Respondents' Attempt to Create a Release by Construction.

The situation in the *Otis* case was not the same as in the case at bar. Here items for repairs and taxes are admittedly allowable and have been allowed. Therefore, the most the respondents can reach by construction is a covenant not to sue—a covenant the United admittedly violated. (See petitioner's brief, p. 44.)

The reservation runs against any rights in the estate which had been surrendered and which is now being administered under Sec. 77B.

The respondents' efforts to construct a release are too easily upset. Their grasping at particular words is, of course, wrong under the canons of construction. Yet even that may be turned on them. The "bankrupt estate" is the very estate which is now being administered in these proceedings under Sec. 77B which says in (b) (10) 'creditors' shall include * * * all holders of claims * * * against the debtor *or its property.*" "Provable claims" is a term common to both the prior proceeding and these proceedings. "The Bankruptcy Court" has jurisdiction of these proceedings under Sec. 77B by virtue of Sec. 77A. The statute says in subdivision (k)

> "provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceeding in bankruptcy' shall be deemed to include proceedings under this section * * * ".

The word "is" depends upon the verb of the main clause which is "may adjudge" and "may" implies possibility as well as probability (*Griggs* v. *City of St. Paul,* 56 Minn. 150, 154 (1894), construing a contract; *United States* v. *Lexington Mill & Elevator Co.,* 232 U. S. 399, 411 (1914), construing a statute). The word "is" as used in the reservation is used "not in relation to time but as the present tense of logic" (*Bourke* v. *McNutt* (*In re School Board Election For the Parish of Pulborough*), L. R. (1894) 1 Q. B. 725, 734). The term "Trustee in reorganization proceedings" is one lately adopted by the respondents. The statute refers to the trustee for the debtor and its estate and that is the title which has been previously used in these proceedings (R. 28, fol. 42). The stockholders are here by grace of Sec. 77B which expressly recognizes the petitioner as a creditor. They have no right superior to the statute under which they claim.

Finally the respondents have not met the point that the United adopted Sec. 77B as the law governing these proceedings.

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APPENDIX.

The Statutes.

"(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section; (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. *All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section;* the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication. (Italics supplied.)